Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1978

No. 78-205

GIFT WRAPPING & TYINGS ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and EASTERN RAILROADS,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and EASTERN RAILROADS,
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PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

The petitioner, Gift Wrapping & Tyings Association, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 9, 1978.

OPINION BELOW

Under local Rule 13(c) the Court of Appeals entered its judgment below without opinion. In pertinent part the judgment below was:

"This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing it is

"ORDERED AND ADJUDGED by this Court, that the order of the Interstate Commerce Commission under review is hereby affirmed."

The initial decision of the Interstate Commerce Commission rendered December 6, 1976 and the order of the Interstate Commerce Commission granting reconsideration and affirming its initial decision entered March 8, 1977 appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the D. C. Circuit was entered on May 9, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 2350(a) and 1254(1).

QUESTIONS PRESENTED

1. When the Interstate Commerce Commission investigates a rail rate increase, may the increase be approved when it creates Fourth Section departures, and when the approval order grants or cites no permission for the departures?

2. Did the Interstate Commerce Commission order under review fail to include a statement of findings and conclusions

and the reasons or basis therefor on all material issues of fact and discretion presented on the record, contrary to § 557(c)(A) of the Administrative Procedure Act, 5 U.S.C. § 557(c)(A)?[1]

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49, §§ 4(1), 15(7), and 15(8)(f).

Title 5, U.S.C. §§ 553, 556, 557, and 706.

Title 28, U.S.C. §§ 2321(a) and 2342(5). The text of these statutory provisions appear in the appendix hereto.

STATEMENT OF THE CASE

In April of 1976 the Interstate Commerce Commission suspended and placed under investigation rate increases published by the Eastern Railroads applicable to carload shipments of paper and paper articles between points in Official Territory. (R. 8-11). In the course of the investigation shipper protestants, including petitioner, raised a number of material issues concerning the lawfulness of the rates under scrutiny, but the Commission in an initial decision approving the assailed rates and then in a final order on reconsideration approving this initial decision declined to address or resolve these issues.

Petitioner sought review in the Court of Appeals for the District of Columbia, and an order setting aside the Commission's initial and final decisions. The Court of Appeals had

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[1] The questions listed above are the basis for this petition. If certiorari is granted, petitioner will also raise the following question important to the case:

Did the orders under review make adequate findings concerning miles of haul, lading weights, equipment types, cost updating, and sampling standards when evaluating the lawfulness of the subject increases?

jurisdiction under 28 U.S.C. §§ 2321 and 2342 and venue lay in the D. C. Circuit under 28 U.S.C. § 2343. Petitioner, a party to the Commission investigation, had standing to seek review under 28 U.S.C. § 2348.

The plainest and grossest of the questions raised by protestants in the investigation below, and left unresolved by the Commission, concerned Fourth Section departures created by the subject rate increases. Section 4 of the Interstate Commerce Act, 49 U.S.C. § 4, forbids railroads to receive "greater compensation * * * for a shorter than for a longer distance" when rendering transportation service on the same route. The Interstate Commerce Commission ordered investigation below with language citing the Fourth Section:

> "* * * It * * * appearing that upon consideration of the said [tariff] schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be in contravention of the provisions of section 4 of the Interstate Commerce Act without appropriate authority, and good cause appearing therefor, it is ordered that an investigation be, and it is hereby instituted * * *." (R. 8).

The investigated rail rates involved an increase of approximately 10% in the freight charges for shipments weighing approximately 40,000 lbs. or less between points in Official Territory, an area which may be described approximately as the territory east of the Mississippi River and north of the Mason-Dixon Line. In the record below the shipper protestants showed that the Official Territory rate increases caused short haul charges to exceed long haul charges on routes in four directions: (1) to New England, (2) to Long Island, (3) to the South, and (4) to the West. During the course of the investigation the railroads acknowledged the disparities to New

England and Long Island and obtained explicit Fourth Section relief orders from the Commission permitting these disparities to persist.[2] Because Fourth Section departures to the South and the West persisted, petitioner told the Court of Appeals below at pp. 39-40 of its opening brief:

> "There remain Fourth Section violations involving shipments to more distant points in Western Trunk Line Territory and in Southern Territory—all of which the railroads had admitted to exist, and which they had sought to justify on the ground that prior general increase orders had granted the necessary Fourth Section relief. The initial decision makes no reference to these violations whatsoever. GWTA's petition for reconsideration brought these aspects of Fourth Section violations again to the Commission's attention (R. 238), and the order under review includes no reference to the Fourth Section whatsoever. (R. 314-315).
>
> "In other words there is no question that the rate increase under investigation is in violation of Section Four of the Interstate Commerce Act. There is no question that no Commission order has been specifically addressed to an approval of these violations * * * to Southern and Western Trunk Line destinations. The most serious and documented accusation has been made in the shipper papers below that no prior Commission order has ever authorized such Fourth Section violations, thus raising very material issues of fact, law and policy, and the order under review fails to include any findings resolving those issues."

The Commission in its brief to the Court of Appeals admitted that petitioner was right in saying that the assailed rate

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[2] The railroads obtained these two relief orders ex parte and without any notice to the shipper protestants, including members of GWTA, one of a number or irregularities in the proceeding under review petitioner's objections to which have been overruled by the Commission and ignored by the Court of Appeals.

increases violated the Fourth Section respecting routes to the South and to the West. The Commission's language from pp. 22-23 of the Commission's brief to the Court of Appeals reads:

> "Finally, GWTA argues that Fourth Section violations involving shipments to Southern and Western Trunk Line Territory continue to exist. *We agree.* However, GWTA fails to acknowledge that outstanding relief from section 4 on these violations allow the carriers to maintain higher rates in Official Territory by reason of Fourth Section Order 18982. *Commodity Rates East of the Rocky Mountains,* 304 I.C.C. 534 (1958), reopened 329 I.C.C. 212 (1966). That relief applies to the assailed commodity rates here; and as long as the rate level is not reduced below the floor level described in that report, the relief remains in effect. Id. at 304 M.C.C. 541. GWTA has not and cannot document any variance from that relief."

Thus there is no issue between the parties that there are Fourth Section departures not covered by any Commission Fourth Section relief order addressed specifically to those departures. Instead the Commission appears to say that an order originally issued in 1958 in general or categorical terms covers the circumstances of the Fourth Section departures to the south and to the west which admittedly exist. To this there are several replies which could be made:

A. If this is true, why is it that the railroads never so much as mention Fourth Section Order 18982 to the Commission in the record below as justifying their Fourth Section departures?

B. If this is true, why did not the Commission in the order under review cite FSO 18982 as the reason why the shipper objection concerning the Fourth Section were ill-taken?

C. If this is true, why did the railroads need, seek and obtain specific Fourth Section relief orders addressed to the departures on routes to New England and to Long Island? The record, the Commission order under review, the Commission brief to the Court of Appeals below and the railroad brief to the Court of Appeals are all silent and supply no answer to these questions.

The most important obstacle, however, to use of FSO 18982 as a justification for Fourth Section departures to the West and the South is that to which petitioner invited the attention of the Court of Appeals at pp. 27-28 of its reply brief in this language:

> "When the Commission reopened this Fourth Section question in *Commodity Rates East of the Rocky Mountains,* 329 I.C.C. 212 in 1966, it noted explicitly that Fourth Section Order No. 18982 'is not an unlimited order,' has the 'purpose' of covering 'long- and short-haul departures which, of necessity arise when the methods favored by us, such as mileage scale groupings, are followed in establishing a rate structure,' therefore deal with a 'situation' which 'is limited in scope and comes within the special-case requirement of section 4(1) of the act,' and 'the relief here granted does not prejudge other issues. Such issues are those which do not involve the specific departures considered herein.' (329 I.C.C. at 215)."

Therefore in its reopened proceeding concerning FSO 18982 the Commission established a condition assuring that the general terms of FSO 18982 could never be used to sanction specific Fourth Section departures when there was explicit shipper objection to those departures. The Commission's amendatory language was:

> "We conclude that henceforth contest by way of protest, complaint or investigation of any rate purportedly established under the supplemented order [No. 18982] will automatically result in a reopening of this proceeding. The

proponent of the contested rates will thereupon be required to prove that fourth-section departures will not occur or establish a justification for fourth-section relief. Where rates are unopposed, coverage under the order will be assumed." (329 I.C.C. at 216).

Therefore petitioner told the Court of Appeals that "reliance by Commission counsel on *Commodity Rates East of the Rocky Mountains*, 304 I.C.C. 534, 329 I.C.C. 212, and on Fourth Section Order 18982 is plainly mistaken." (Reply Brief, p. 28).

The railroads in the record before the I.C.C. below advanced no "justification" for Fourth Section relief to the West and the South. The Commission acknowledged no such justification from the railroads in the order under review. The Commission granted no Fourth Section relief to the West and the South and hence there has been no scintilla of compliance with the above-quoted conditions of FSO 18982.

REASONS FOR GRANTING THE WRIT

The Fourth Section of the Interstate Commerce Act, 49 U.S.C. §4, forbids lower rates for the long haul than for the short haul on the same rail route. Unlike most other strictures of that statute, Section Four is uncontingent. Section 1(5) prohibits rates which are "unjust and unreasonable," §2 forbids discrimination "under substantially similar circumstances," and §3(a) forbids prejudice or preference which are "undue." Section Four, however, forbids "greater compensation * * * for a shorter than for a longer distance" without any of these qualifications. To come within the scope of the Fourth Section's prohibition, the transportation rate differential need not be "unjust," "unreasonable," or "undue"—it need only exist.[3]

The Interstate Commerce Commission of course has power to relieve a carrier from Fourth Section strictures, but only in a special case, and only by an explicit order. *City of Spokane v. N.P. Ry. Co.*, 21 I.C.C. 400, 410-415 (1911); *Intermountain Rate Cases*, 234 U.S. 476 (1914); *United States v. Union Pacific R.R. Co.*, 234 U.S. 495 (1914). Congress undertook to specify carrier violation of the Fourth Section "distinctly [as] one practice which it wishes to destroy." *Railroad Commission of Nevada v. S. P. Co.*, 21 I.C.C. 339, 339 (1911).

The agency brief to the Court of Appeals admits the fact of the assailed Fourth Section departures to the West and the South. The agency order under review cites the existence of no Fourth Section relief which justifies those departures (probably

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[3] This was not always the case. As originally enacted the Fourth Section forbade charges higher for the shorter than for the longer haul only "under substantially similar circumstances and conditions." Re *Southern Railway and Steamship Association*, 1 I.C.R. 278 (1887). The qualification was eliminated in 1910. The very fact of its elimination renders the present prohibition of the Fourth Section the more absolute. *Intermountain Rate Cases*, 234 U.S. 476, 484 (1914).

because the railroad proponents of the rates under investigation cited no such relief). The agency brief to the Court of Appeals below does cite a Fourth Section order which by its very terms cannot possibly apply to the facts of record. The Court of Appeals has affirmed the Commission by summary mandate without opinion.

Certiorari should issue for two reasons. The first reason is to correct the essential lawlessness of this proceeding in its present posture. The Commission in the order under review and the Court of Appeals in the mandate issued below have acted as though the Fourth Section of the Interstate Commerce Act does not exist. We complain not of bad decisions by the Commission and the Court of Appeals, but instead of non-decisions. A regulatory and judicial system becomes arbitrary and dangerously sacrifices public confidence when it refuses to grant so much as a day in court to a substantial, material and bona fide contention of an aggrieved petitioner.

Secondly, the refusal of the Court of Appeals even to acknowledge much less to decide the Fourth Section question in this proceeding conflicts squarely with the contemporaneous ruling of the United States Court of Appeals in *Seaboard Allied Milling Corp. v. Interstate Commerce Commission*, 570 F.2d 1349 (8 Cir., February 16, 1978). There the railroads published a 20% increase in rates on grain products in the South and shippers objected on the ground that the increases created unsanctioned Fourth Section departures. The I.C.C. refused either to suspend or investigate the assailed rate increase,[4] but warned that the railroads

> "are admonished to take prompt action to remove violations of the long- and short-haul provision of Section 4(1) of the Act, if any, in connection with the inter-territorial

[4] In contradistinction to the proceeding under review here, where the I.C.C. did both suspend and investigate.

> and intra-territorial movements that may be caused by application of demand-sensitive rates on whole grains between points in southern territory." (570 F.2d at 1357)

Thus the Commission admitted the existence of Fourth Section violations in its order refusing to investigate them, much as in the pending proceeding the Commission has admitted the existence of Fourth Section violation in its brief below to the Court of Appeals. Accordingly, the Court of Appeals for the Eighth Circuit ruled:

> "While no formal hearing on the lawfulness issue was ordered by the Commission, the protestants' basis for declaring the tariff violated applicable statutes was clearly raised before the Commission. The Commission's order refusing to pursue the investigation reflects that it recognized and considered protestants' claims. We believe that the Commission was derelict in its responsibility in refusing to pursue the investigation of the substantial charges of illegality which were made. Its order in effect made the proposed tariff operative and placed it in effect. Its order reflects no supporting findings or a reasonable basis for so doing, at least with respect to the charged Section 4(1) violations. Its order in effect is a final order on the Section 4(1) issue." (Id., 1354).
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> "We believe a substantial issue of patent illegality has been presented. The validity of such complaint was not determined by an adequate investigation. We express no view on whether the proposed tariff violates the short- and long-haul provisions of Section 4(1) but do hold that the charge has sufficient substance to require the Commission to investigate charges of such violation and to make appropriate findings and conclusions on the basis of such an investigation." (Id., 1355).
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> • • • • • • • •

> "We hold that under the peculiar circumstances of this case charging patent illegality of the proposed tariff that the Commission's determination not to adequately investigate the charges should be vacated. This case is remanded to the Commission with directions to investigate the charges of patent illegality and to make findings and determinations based upon such investigation." (Id., 1356).

In *Seaboard Allied Milling Corp. v. Interstate Commerce Commission*, supra, the Court of Appeals for the Eighth Circuit found a pretrial contention of Fourth Section violation to constitute the possibility of so "patent" an "illegality" as to require oversight of the normally unfettered discretion of the Interstate Commerce Commission whether to institute a rate investigation. In the case at bar there has been not just the contention of a Fourth Section violation, but its concession by the Commission in the Commission's brief to the Court of Appeals. There has been not merely a refusal to investigate a patent illegality, but instead a refusal to acknowledge in agency findings the existence of a patent illegality which the agency has admitted in its brief to the reviewing court. Nothing in the order under review reports or refers to any prior Fourth Section relief justifying Fourth Section departures to the South and the West. In contradistinction to the Court of Appeals for the Eighth Circuit, the response of the Court of Appeals below to a record in this posture has been a summary mandate affirming the Commission without opinion.

The conflict between the view taken of the Fourth Section of the Interstate Commerce Act in the D. C. Circuit Court of Appeals and the Eighth Circuit Court of Appeals could not be greater.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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Dated: August 3, 1978

APPENDIX

OPINION APPENDIX

This report will not be printed in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

(Service Date, December 6, 1976)

INVESTIGATION AND SUSPENSION DOCKET NO. 9114
PAPER BETWEEN POINTS IN OFFICIAL TERRITORY

Decided November 23, 1976

Proposed increased rates on shipments of certain paper and paper articles between points in Official territory found to be just and reasonable. Proceeding discontinued.

D. A. McCormick and *J. J. Paylor* for respondents.

William Q. Keenan for protestants.

Report and Order of the Commission
Review Board Number 4
Members Fitzpatrick, Shaw, and Fisher

By the Board:

The modified procedure was followed. Due and timely execution of our functions under section 15(8) of the Interstate Commerce Act imperatively and unavoidably requires the omission of a recommended decision in this proceeding. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

By schedules filed to become effective May 1, 1976, the Traffic Executive Association-Eastern Railroads, Agent, (TEA-ER) published for the account of its member rail lines (respondents) increased rates[1] applicable on carload shipments of "light loading" paper and paper articles, as described in item 600 of the tariff, minimum weight 36,000 pounds,[2] between points within Official territory. Upon protest of certain affected shippers, the operation of the proposed schedules was suspended to and including November 30, 1976.

To attain a better understanding of the present posture of this proceeding, it will be necessary more fully to describe the tariffs at issue and the various amendments thereof published subsequent to the institution of this investigation. By order dated April 28, 1976, the Commission's Suspension and Fourth Section Board instituted an investigation of certain rate changes published in supplements 276 and 277 of TEA-ER's tariff 703-B, I.C.C. No. C-366. These supplements were published to become effective May 1, 1976, and proposed to establish a new section of the tariff containing a scale of increased rates on the paper articles described in item 600, minimum weight generally 36,000 pounds, to apply within Official territory. However, the application provisions governing the new rates stated that they would not apply from or to stations on the Long Island Rail Road Company (LI railroad), and that they would not apply from or to stations on the Boston and Maine Corporation, Bangor and Aroostook Railroad Company, Maine Central Railroad Company, and the Claremont and Concord Railway Company, Inc. (hereafter the NE railroads). The proposal also contained new provisions specifically making the prior level of rates on item-600 articles applicable in the future, only from or to stations on the NE railroads, and on the LI railroad. The above described proposals thus would have resulted in increased rates on item-600 paper articles, minimum 36,000 pounds, moving between all points in Official territory, except points located on the NE railroads or on the LI railroad.

[1] Rates and costs are stated in cents per 100 pounds, unless otherwise indicated. The increases range from 9 to 25 percent and average 10 percent.

[2] Schedules naming motor competitive reductions on heavy-loading shipments of 50,000 pounds were published to become effective concurrently with the increases on light-loading shipments of 36,000 pounds; however, the reductions were not protested.

After this proposal was protested by interested shippers, the Suspension and Fourth Section Board informally determined that the proposed increased rates would be in contravention of the provisions of section 4 of the Interstate Commerce Act without appropriate authority, in that they could result in the charging of a higher rate for a shorter haul than for a longer haul over the same route or routes. However, in instituting this investigation, the Board specifically stated that the proceeding would consider all matters and issues with respect to the lawfulness of the proposed schedules under the Interstate Commerce Act.

Subsequently, TEA-ER published supplement 289 to the involved tariff under Special Permission No. 77-692, to become effective October 30, 1976. This supplement brought forward the scale of increased rates on item-600 paper articles within Official territory, minimum weight 36,000 pounds. However, this publication only brought forward the governing application provision restricting the rates therein from applying from or to stations on the LI railroad. Thus, the proposed increased rates would also become applicable from or to stations on the NE railroads. In conection with this publication TEA-ER sought and was granted authority to depart from the provisions of section 4 by maintaining higher rates at intermediate points in Official teritory in connection with traffic from or to points on the LI railroad, in Fourth Section Application No. 43240, 168th Supplemental Fourth Section Order 18043, effective October 27, 1976. The effect of these steps has been to remove the

Fourth-Section violations except from or to LI railroad points and to provide authority for departures from the provisions of section 4 of the act insofar as the LI railroad is concerned. Thus, the section 4 issues in this proceeding have been rendered moot by the actions of the respondents and this Commission. Therefore, remaining for determination in this proceeding is the lawfulness of the proposal under other sections of the act.

The principal issue for resolution is whether the proposed increased rates are just and reasonable. Since the proposal involves a change in rates, charges, rules, and practices, respondents have the burden of proof under section 15(8) of the act. Evidence in support of the proposal was presented by respondents; evidence in opposition was submitted by protestants, to which respondents replied.

The asserted purpose of the proposal is to increase the Official territory carriers' revenue from light-loading paper and paper articles traffic which is claimed to be marginal or deficient at present rate levels. The proposed rates are at the same level as those presently published on sanitary paper, another light-loading commodity.

In support of the proposed rates, respondents submit two separate studies of the issue traffic in which Rail Form A[3] costs are indexed to the April 1, 1976, level. The first study involves 65 movements[4] selected by random sampling of 6,691 actual movements in which Penn Central Transportation Company (now Conrail) participated, and presents dual costs based upon: (a) application of Penn Central unit costs to local movements and application of Official territory less Penn Central unit costs to joint-line movements, and (b) application of Official territory

[3] Statement No. 1F1-73, entitled "Formula for Use in Determining Rail Freight Costs", prepared by the Commission's Bureau of Accounts.

[4] Of the 65 movements in the sample, 14 (22 percent) were in equipped boxcars and 51 (78 percent) were in unequipped boxcars.

unit costs to all 65 movements. Utilizing method "(a)", present rates produce revenues that are on the average 83.3 percent of fully allocated cost (ton and ton-mile basis), and 91.1 percent of variable cost, with 5 of the 65 movements making some contribution above variable cost. By use of method "(b)", present rates produce revenues that are on the average 97.3 percent of fully allocated cost (ton and ton-mile basis), and 107.7 percent of variable cost, with 44 of the 65 movements making some contribution above variable cost.

The second study involves the 20 highest volume movements, representing 59 percent of Chessie originations of this traffic, under 40,000 pounds on the Chessie System—which system incurs lower than average operating costs—and moved to Official territory destinations via routes which do not include the Penn Central. This study shows that present rates produce revenues ranging from 106 percent to 146 percent of variable cost and that the proposed rates would produce revenues ranging from 118 percent to 160 percent of variable cost.

Protestants, Single Service Institute (SSI) and Gift Wrappings & Tyings Association (GWTA), represent major manufacturers of paper plates and cups and gift wrapping materials. These item-600 commodities move via rail, require only unequipped boxcars, and frequently fill a car before reaching the 36,000-pound minimum. Protestants assert that they will be adversely affected by the proposed rates, which reflect a cumulative increase of more than 20 percent (including that recently authorized in Ex Parte No. 318). The demand for gift wrapping paper is assertedly of such a nature that the increase cannot be passed on to customers; the traffic cannot be diverted to other modes because their rates are so high.[5] The demand for disposable table-

[5] GWTA indicates that based on 1975 shipments of 2,675 carloads, cancellation (which is not proposed herein) of the 36,000-pound rate would increase its freight charges by $800,000 if the 50,000-pound rail rate is used, $1,200,000 if trailer-on-flatcar is used, and $3,000,000 if trucks are used.

ware, valued at only 50 cents a pound, is also highly price sensitive. Protestants assert that continued increases in rail rates will encourage decentralization of production to shorten the radius of market distribution and thereby limit or curtail the present use of regional warehousing for breakbulk of rail shipments into less-than-carload highway shipments.

Protestants object to some aspects of the sampling procedure used to select the 65 Penn Central movements which form the basis of respondents' study. They assert that work papers disclosed to them indicate computation of a standard error for each of the movements and that this was not referred to by respondents' witnesses. Protestants contend that the study cannot be validated until the standard error has been ascertained and explained. They also maintain that it is improper to include movements to or from New England since they would not be subject to the proposed rates (as originally published).

Protestants stress deficiencies in the railroads' cost presentation but submit no cost estimates of their own. They contend that respondents overstated costs by the use of the cost indexing method suggested in Statement 2-58[6] to update 1973 costs to the 1976 level, because it does not take into account the sharp contraction of the Penn Central labor force that has taken place since 1973. They also point out that respondents' costs are based on billed weights, which can exceed actual weight by up to 70 percent, and that, since no actual lading weights are disclosed (except on movements of the Chessie System), there is no way to assess the reliability of the cost ratios. Protestants recalculate Chessie System costs on the basis of actual weights on 10 of the 20 sample movements to show that Chessie System revenues on half of the movements are already 2.78 times variable cost and would increase to 3.10 times variable cost under the proposed

[6] Entitled "Rail Carload Cost Scales by Territories as of January 1, 1958", prepared by the Commission's Bureau of Accounts.

rates. However, respondents point out that these figures are based upon a misinterpretation of their cost evidence. Protestants contend that car costs should be calculated according to the type of equipment ordered (always unequipped boxcars), rather than the type of equipment furnished (frequently equipped boxcars). Protestants further note that rail costs are based on actual mileages which significantly exceed docket No. 28300 mileages (20 percent of Penn Central's traffic appears to be 40 percent or more circuitous), but that there is no documentation of the mileages used.

To criticism of the sampling procedure, respondents reply that the Commission has long given credence to random samples such as used in the Penn Central study and to judgment samples such as used in the Chessie System study.

In reply to various objection to the costing procedure, respondents note that actual weights as well as billed weights were shown in the Chessie System study, then call attention to the Commission's approval of the use of tariff minimum weights for costing in I. & S. Docket No. 8978 (Sub-No. 6), *Sanitary Paper, from Points in the North to the South,* decided by this Board on July 15, 1976 (not printed). Respondents cite the same proceeding as authority for using actual route miles not increased for circuity, but they do not directly respond to criticism that the mileages used should have been documented. They also defend applying costs for the equipment actually used but assert that, even if the lower costs for unequipped boxcars had been used, in all instances it would have made only a slight difference in the total costs. Respondents explain that because precise equipment data were not available for moves originating on the Chessie System, it was assumed that the relationship of boxcar types used would be the same as in the Penn Central study. On that basis (28% equipped boxcars and 72% unequipped boxcars), the proposed rates were calculated to produce revenues ranging from 118 percent to 160

percent of variable cost; assuming that all traffic moved in unequipped cars, the revenue-to-cost ratios would range from 121 percent to 164 percent, an insignificant difference. They also state that protestants erroneously restated Chessie System costs on the basis of the actual weight of each shipment, and they urge that respondents properly calculated costs on the basis of the 36,000-pound carload minimum, which is the same basis upon which the related rates are made and compared. Thus, the maximum revenue-to-variable cost ratio is 160 percent, and the traffic is not "enormously profitable" to Chessie System as alleged by protestants.

Respondents further state that, although protestants criticize the cost indexing methodology, they do not suggest any other methodology. Respondents note that the 1975 Rail Form A costs for Chessie System lines which have since become available are generally equal to or higher than the costs actually used in the study (1974 costs indexed to April 1, 1976). For this reason, they contend that the cost figures used are actually conservative.

Discussion and Conclusions

As stated previously, the principal issue in this proceeding is whether the proposed increased rates are just and reasonable. Respondents have the burden of proof under section 15(8) of the act.

Respondents contend that the present rates on light-loading paper articles as described in item 600 of the applicable tariff are generally maintained at a marginal or noncompensatory level and that the proposed increase of 10 percent will result in rates which do not exceed a maximum reasonable level. They support this contention by reference to a statement of the United States Railway Association in its "Final System

Plan" calling attention to the noncompensatory status of light-loading paper articles and to the opportunity for the railroads to increase earnings on the traffic without fear of its diversion to motor carriers. Respondents also observe that the proposed rates are at the same level as those presently applicable on sanitary paper; the rates on both sets of light-loading commodities had been at the same level until rates on sanitary paper traffic were recently increased.[7] However, principal support for respondents' position comes in the form of two sets of rate-cost studies.

The first study, involving 65 movements in which the Penn Central was a participating carrier, shows that the present rates produce revenues that are on the average 107.7 percent of Official territory variable costs, but are merely 91.1 percent of variable costs based on a combination of Penn Central costs for local Penn Central movements and Official territory costs for movements involving other carriers.

The second study, involving 20 movements in which Penn Central did not participate, shows that on the basis of Chessie System unit costs the present rates produce revenues that range from 106 percent to 146 percent of variable cost, and that the proposed rates would produce revenues that range from 118 percent to 160 percent of variable cost.

Although respondents' cost data were prepared in accordance with generally accepted procedures, protestants object to various aspects of it. However, their objections provide no basis for the rejection of the evidence, and protestants offer no evidence of their own. The fact that one of respondents' witnesses failed to refer to a computation of sampling variance that may have appeared on the work papers is, in the absence

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[7] Increases in Official territory rates on sanitary paper were approved in I. & S. Docket No. 8978 (Sub-No. 1), *Sanitary Paper, Points in the East and Midwest* decided by this Board on December 1, 1975 (not printed).

of some evidence that the unexplained computation could have affected the representativeness of the sample, no reason for rejecting the movements selected for comparisons of revenue to cost. Similarly, objections directed toward respondents' use of billed weights rather than loaded weights, type of car used rather than type of car ordered, and route-of-movement mileage rather than short-line mileage provide no reason for rejecting the cost computations themselves. Inasmuch as the rates are made on the basis of a 36,000-pound minimum it is entirely appropriate that they be compared with costs constructed on the same basis. Although protestants may not have ordered equipped boxcars, it is appropriate that costs be based on the type of cars furnished and used, for the rates involved are not limited to a particular car type. However, even if respondents had computed costs of all movements on the basis of unequipped cars, the change in revenue/cost ratios would be much too slight to alter our findings. Protestants' objection to the circuity of the mileage appears to be predicated on the fact that for 13 of the 65 sample movements actual miles exceed short-line miles by more than 40 percent. However, for all 65 movements, protestants' own calculations show that the actual miles (35,685) are practically the same as the short-line miles (30,485) increased by the generally accepted railroad circuity factor of 17 percent (35,667).

There is some merit in protestants' position that the Commission-accepted method of updating costs does not reflect the major changes that have taken place in Penn Central's labor force costs subsequent to the base cost year that is being updated. We realize that the longer the time span, the greater the margin for error, and hence believe that costs should not be indexed over an extended period. Here the costs have been indexed for periods of 3 years or less, and any magnification of error is likely to be insignificant. Moreover, protestants do not suggest any better way of bringing costs to a current and comparable level.

In view of the close relationship between the present rates and variable costs for movements of the traffic here at issue, we conclude that the average 10 percent increase will result in rates which do not exceed the maximum level of reasonableness. Compare, *Transit Charge on Soybeans at Points in the South*, 351 I.C.C. 366 (1975). Moreover, the proposed increase compares favorably with the higher rates on other light-loading paper articles approved in I. & S. Docket No. 8978 (Sub-No. 1), *supra*, and will restore the parity which formerly existed between the two groups of paper products.

We find the proposed increased rates to be just and reasonable.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That this proceeding be, and it is hereby, discontinued.

By the Commission, Review Board Number 4.

ROBERT L. OSWALD
Secretary

(Seal)

ORDER

(Service Date March 11, 1977)

At a Session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division, held at its office in Washington, D.C., on the 8th day of March, 1977.

INVESTIGATION AND SUSPENSION DOCKET NO. 9114
PAPER, BETWEEN POINTS IN OFFICIAL TERRITORY

Upon consideration of the record, including separate petitions filed January 5, 1977, by protestants Gift Wrapping & Tyings Association and Single Service Institute for reconsideration of the prior request and order decided November 23, 1976, and respondent Eastern Railroads' reply brief filed January 24, 1977; and protestants' joint motion filed January 31, 1977, to strike portions of respondents' reply to protestants' petitions for reconsideration and respondents' reply to motion filed February 4, 1977; and

It appearing, That pursuant to section 15(8), as amended by section 202(e) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), a final decision must be rendered not later than 7 months after the rate, fare or charge was scheduled to become effective, unless the Commission reports to Congress that it is unable to render a decision within such period in which case the statute provides for a 3-month extension, after which a rate, fare, or charge may be set aside by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful;

It further appearing, That the 7-month period had elapsed when the petition for reconsideration of the prior decision was filed and that the 10-month period has now expired;

It further appearing, That pursuant to section 17(9)(g), as amended by the 4 R Act, the Commission may at any time upon its own initiative, grant reconsideration with respect to any decision, order or requirement on specified grounds, including material error, and that material error exists in the decision issued November 23, 1976; that in particular, the Review Board accepted without question two cost studies tendered by the protestants, basing its decision in part upon the asserted "close relationship between the present rates and variable costs for movements of the traffic here at issue," and that significant errors exist in respondent's cost study, which are discussed in the Appendix hereto;

It further appearing, That a grant of reconsideration in this proceeding processed during the period of transition to the requirements of the 4 R Act would preserve the parties' right to judicial review, and is warranted under the unusual circumstances presented herein;

Wherefore, and good cause appearing therefore:

It is ordered, That reconsideration be, and it is hereby granted;

It appearing, That the respondents' cost evidence, as restated in the Appendix to this order, indicate that the respondents' rates as increased by the rate adjustment sought herein, do not, in total, exceed a just and reasonable maximum and that the finding therein was based, not only on statistical and cost evidence, but also on comparison with rates in the same general territory on other light-loading paper articles approved in Investigation and Suspension Docket No. 8978 (Sub-No. 1), *Sanitary Paper, Points in the East and Midwest;*

And it further appearing, That petitioners' other arguments, including allegations that the Review Board erroneously shifted the burden of proof, are without merit;

It is further ordered, That, upon reconsideration, we find the proposed rates to be just and reasonable;

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2, acting as an Appellate Division, Commissioners Hardin, O'Neal, and Christian. (Commissioner Christian did not participate.)

ROBERT L. OSWALD,
Secretary

(Seal)

APPENDIX

Cost Analysis

The only cost data presented herein was submitted by respondents. Protestants developed no cost study of their own and did not elect to restate the data presented by respondents.

It is true that the updating procedure used herein does not reflect changes in unit costs resulting from reduced employment levels and changes in traffic volume or consist. However, this procedure has been used in numerous proceedings and to date is one of the few methods widely used to update costs. Consequently, use of these indices appears to be acceptable here, and this cost updating procedure has been accepted many times previously.

Even though protestant questions the mileages used in developing the railroads' costs, such mileages appear proper. Penn Central states that these are actual route of movement miles. Actual miles of haul are preferable to tariff or Docket 28300 miles, increased for circuity, and produce more reliable results when costing specific movements.

The type of equipment selected in developing costs for specific movements is very important in that factors such as empty return ratios and tare weights applicable to a general service equipped boxcar will yield higher results than those factors applicable to an unequipped boxcar. Respondents' costs reflect movement in the cars actually utilized. Protestants' objection is that since the equipped cars were not sought or required, respondents' costs should reflect only unequipped boxcars. Based on the Commission's orders in I.&S. 8978 (Sub-No. 3) and again in I.&S. 8978 (Sub-No. 6), *supra*, which stated at page 10 that ". . . since an unequipped boxcar was not necessary to move

sanitary paper traffic, costs should be based on the type of cars utilized," protestants' objection seems unfounded.

Respondents "Chessie" study reflects the average lading weights of the selected movements. This is acceptable and has the effect of developing costs for the railroads which are closely aligned to the service actually provided.

In contrast, respondents' "Penn Central" study reflects the billed weights of the movements, rather than actual weights handled. Use of billed weights is appropriate in determining the applicable revenues. However, the services provided by the railroads are related not to the billed weights, but to the actual amount of lading tendered by the shipper. As alleged by protestants, minimum weights exceed the actual weights of the subject traffic handled by from 23 to 70 percent. In 11 of the 65 movements, the minimum weight exceeded the actual weight it handled and, on an average, the minimum weight slightly exceeded the actual weight. In instances such as this, use of minimum weight would understate the actual cost per hundredweight. However, when the billed weight is different from the actual weight, the appropriate revenue/cost comparison is on a total revenue and cost per shipment basis, not a per hundredweight basis. On a total shipment basis, use of billed weight which exceeds the actual weight overstates the costs. In either instance weight rather than billed weight should be used. Thus, the costs shown in Penn Central's Exhibit 1 to Witness Wilke's statement would, in some instances, be substantially overstated. Since the underlying workpapers were not submitted, a restatement of the costs cannot be made. Thus, the degree of overstatement of the costs cannot be determined.

Protestants questioned respondents' sample of the Penn Central movements and pointed out that 13 of the 65 movements represented movements to or from New England. Protestants provided no data, however, which would indicate either that the

remaining 52 movements were not representative of the subject traffic or that the "Chessie" movements were unrepresentative. We find the sample movements to be acceptable, with the exception of the 13 aforementioned Penn Central movements.

Respondents' Penn Central cost study was developed using two different cost bases: the first using Penn Central and Official Territory excluding Penn Central unit costs, and the second using Official Territory costs applied to all movements within the Official Territory. The first study using the Penn Central and Official Territory excluding Penn Central unit costs is preferable for use herein. These data would be more closely aligned with the services provided by the various railroads.

For the most part, the cost/revenue comparisons shown in Penn Central's Exhibit 1 indicate that transportation of the subject traffic would result in a negative contribution (loss) to the railroads involved. The effect of the cost overstatement, noted above, would be to lessen the amount of the loss or, in some instances, possibly to convert the losses shown to a resultant contribution of the rates over the costs.

The comparison of rates and costs for the "Chessie" movements were shown on a per hundredweight basis. As noted above, when the billed weight differs from the actual weight, the appropriate rate/cost comparison is on a total shipment basis. Accordingly, we have restated these comparisons. The results of this restatement indicate that the ratios of present revenues to variable costs for the various movements range from 110 percent to 486 percent, with a simple average of 176 percent.

STATUTORY APPENDIX

U. S. Code Title 5:

SEC. 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice

and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

SEC. 556. HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD BASIS OF DECISION

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

SEC. 557. INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for intial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

U. S. Code Title 49:

LONG AND SHORT HAUL CHARGES; COMPETITION WITH WATER ROUTES

SEC. 4.

(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the

same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this part or part III and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such

tariffs to become effective upon one day's notice: *And provided further*, That the provisions of this paragraph shall not apply to express companies subject to the provisions of this part, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

SEC. 15.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into

effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15.

(8)(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse effect (in violation of section 2 or 3 of this part) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time."

U. S. Code Title 28:

SEC. 2321. JUDICIAL REVIEW OF COMMISSION'S ORDERS AND DECISIONS; PROCEDURE GENERALLY; PROCESS.

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

SEC. 2342. JURISDICTION OF COURT OF APPEALS.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * * * * * *

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

Supreme Court, U. S.
FILED
OCT 12 1978
MICHAEL RODAK, JR., CLERK

No. 78-205

In the Supreme Court of the United States

OCTOBER TERM, 1978

GIFT WRAPPING & TYINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In 1976 most eastern railroads filed with the Interstate Commerce Commission tariffs reflecting a rate increase on certain paper goods. The Commission suspended the increase and conducted a hearing. An employee board (Pet. App. A-1 to A-11) and then a Division of the Commission (Pet. App. A-11 to A-16) concluded that the increase was justified by cost considerations—Penn Central, for example, was not recovering its costs under the old rates—and by comparision with rates in the East on other paper articles.

Before the Commission, petitioner focused primarily on establishing that there were defects in the railroads' cost evidence, but it also argued that the rates violated the "fourth section" (49 U.S.C. 4), which ordinarily prohibits

a higher rate for the shorter haul than the longer haul over the same route. This latter argument—the sole basis now asserted for further review—appeared in the next to the last sentence of the argument in a 36-page petition for reconsideration. The Commission made no explicit finding on the issue, but it stated that arguments not discussed were found to be without merit (Pet. App. A-13).

In the court of appeals the government argued that departures from the long haul-short haul principle had been authorized by earlier, but still outstanding, Commission orders.[1] The court affirmed the Commission's order without opinion (Pet. 2).

Meanwhile, the rates were replaced by new tariffs reflecting another increase on the same goods. That increase (which was not suspended) is the subject of a new Commission proceeding involving petitioner and others. Docket 36817, *Paper Articles Between Points in Official Territory*. Petitioner has repeated and elaborated on its fourth section arguments in that case. The railroads have relied explicitly on the Commission's earlier orders as allowing departures from the fourth section; in addition, their brief in Docket 36817 states that they have filed precautionary applications for exceptions concerning the new rates on these paper goods.[2]

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[1] *Commodity Rates East of the Rocky Mountains*, 304 I.C.C. 535 (1958), modified, 329 I.C.C. 212 (1966). The latter opinion discusses an unreported 1960 order which "granted so-called outside-territory relief," allowing "higher rates from and to points in subterritories [named in the 1960 order] intermediate to the origin and destination subterritories * * *" (329 I.C.C. at 213 n. 2). The areas named in the 1960 order are "Official (eastern), Illinois Southern, Southwestern, and Western trunk line territories * * *."

[2] Docket 36817, Resp. Br. at 31-40.

2. There is no reason for the Court to review the fourth section question on the present record. The orders cited in note 1, *supra*, contain language to support the fourth section departures in this case. Furthermore, the reach of these orders and the accompanying fourth section issues are being explored by petitioner and the eastern railroads in the pending Commission proceeding dealing with new rates on the same paper goods.[3]

By comparison, the issue was not well developed on the present record. The fourth section argument was perfunctory and presented neither examples of the violations nor any showing of prejudice to particular shippers. Moreover, petitioner has asserted throughout the proceedings that "[t]he most important aspect of error" was an alleged lack of adequate findings on other issues (Ct. App. Reply Br. at 1). In these circumstances, the Commission and the court of appeals reasonably concluded that the issue did not warrant particular discussion. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, No. 76-419 (April 3, 1978), slip op. 31, 36.

Petitioner to the contrary (Pet. 10-12), this case poses no conflict with *Seaboard Allied Milling Corp.* v. *ICC*, 570 F. 2d 1349 (8th Cir. 1978), which involved a decision not to investigate under 49 U.S.C. 15(8) a rate that had been challenged on fourth section and other grounds. In the present case, the ICC opened an investigation under Section 15(8); petitioner's quarrel is with the outcome of the proceeding, not any refusal to institute one.

---

[3] If the Commission should determine in the pending proceeding that the fourth section departures were not previously authorized, and that the rates are therefore unlawful, petitioner would be free to seek damages for any injury it has suffered by filing either an administrative complaint or a civil action. See 49 U.S.C. 8, 9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1978

DOJ-1978-10

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND EASTERN RAILROADS,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT EASTERN RAILROADS

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No. 78-205

IN THE

Supreme Court of the United States

October Term, 1978

GIFT WRAPPING & TYINGS ASSOCIATION,
Petitioner,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and EASTERN RAILROADS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EASTERN RAILROADS

QUESTION PRESENTED

Whether the action of the Interstate Commerce Commission authorizing increased rates on paper and paper products exceeded its authority.

STATEMENT OF THE CASE

On November 23, 1976, the Commission approved increases within Official Territory averaging 10 percent in the rates on certain paper articles, concluding that the resulting charges would "not, in total, exceed a just and reasonable maximum" (A. 13).* Following briefing and argument, the Court of Appeals sustained the Commission's order without opinion.

* "A. — " refers to the page number of Petitioner's Appendix.

ARGUMENT

The Questions Presented Are Not Substantial

In the case at bar, petitioner challenged the propriety of the increase on numerous grounds: 1) the adverse effect of cumulative increases; 2) the increase could not be passed on to customers; 3) the rates of other modes were so high as to bar diversion from rail; 4) demand for the product was price sensitive; 5) decentralization of production would result; and 6) departures from the long-and-short-haul provisions of Section 4 of Title 49 would result (A. 3-6). All of these contentions were resolved in favor of the proposed increase.

The 4th Section problems arose from the fact that New England lines, the Long Island Rail Road and the Southern and Western railroads did not join in the increase, thereby giving rise to departures under the long-and-short clause. But the only questions for the Commission were whether the departures were authorized under outstanding orders, and, if not, whether authorization to depart should issue.

Since the New England lines subsequently joined in the increase, the departures there disappeared. As to the Long Island, relief was sought and granted (A. 3-4).

Petitioner's sole remaining charge is that 4th Section relief was not granted by the Commission with respect to Official Territory (East) border points on interterritorial traffic from the East to the West or South. But petitioner is and was fully cognizant of the broad outstanding relief with respect to interterritorial mileage scale rates issued in *Commodity Rates East of the Rocky Mountains*, 304 I.C.C. 534, 329 I.C.C. 212. Petitioner simply argues that such outstanding relief does not extend to the rates in question, and that it, in any event, had no notice, either of the mooting out of the question with respect to the New England lines or the relief granted with respect to the Long Island.

Petitioner is in no different position than were the inland cities complaining of the 4th section relief granted the railroads in maintaining lower rates to Pacific Coast ports in *United States v. Merchants &c. Ass'n.*, 242 U.S. 178 (1916). Mr. Justice Brandeis summarized with the following:

> "It may be doubted whether application by the carrier is a prerequisite to the granting of relief. As was said in *Intermountain Rates Cases*, 234 U.S. 476, 485, § 4 vests in the Commission the 'primary instead of a reviewing function' to determine the propriety of a lesser rate for a longer distance; and § 13 declares that the Commission 'shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relative to the matter or thing concerning which the inquiry is had excepting orders for the payment of money.' Unless formal application be an indispensable prerequisite to the exercise by the Commission of the power granted by the Fourth Section, its absence or a defect in it could be waived by the filing of tariffs under the order entered. For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is customary and proper for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted

seem to them unreasonable, or unjustly discriminatory §§ 13 and 15 afford ample remedy. Respondents contend that after the amended order was entered and the tariffs filed, they did apply to the Commission for relief 'but were denied the right of a hearing' and that 'their protest and demand were ignored and denied.' What they did was to petition for a 'rehearing' in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged discriminations might result in creating infinitely more." (pp. 187-88)

Petitioner here has the same remedies available should it elect to pursue the subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 27, 1978

CERTIFICATE OF SERVICE

I, JOHN A. DAILY, a member of the bar of the Supreme Court of the United States and an attorney of record in the cause to which this certification is attached, hereby certify that on this 26th day of September, 1978, I served or caused to be served, true copies of the foregoing Brief in Opposition on counsel for all parties of record herein and on the Solicitor General of the United States, in the manner provided by Rule 33 of the Supreme Court of the United States. I further certify that as to all parties residing more than 500 miles from Philadelphia, the place of posting of this Notice, that the same were served by mail with air mail postage prepaid affixed.

JOHN A. DAILY

Supreme Court, U. S.
FILED
OCT 26 1978
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION

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The memorandum in behalf of the Government in opposition to the petition for certiorari apparently urges denial of the petition on two grounds: (a) The case is too trivial to decide and (b) the issue should be left for decision in a later case now wending its way through the corridors at the I.C.C. In support of this position the Government relies on several new arguments:

1. In I.C.C. Docket 36817 there is pending an investigation of "new tariffs reflecting another increase on the same goods," in which "petitioner has repeated and elaborated on its Fourth Section arguments." (Government memorandum, p. 2). Therefore "there is no reason for the Court to review the Fourth Sec-

tion question on the present record" because the "Fourth Section issues are being explored by petitioner and the eastern railroads in the pending Commission proceeding dealing with new rates on the same paper goods." (id., p. 3).

This is material *dehors* the record herein and is therefore tendered the Court improperly. Worse, it misleads. In Docket 36817 the railroads cancelled Uniform Classification Rule No. 24 within Official Territory[1] but failed to cancel Rule 24 as to all interterritorial shipments from and to points in Official Territory. Rule 24 permits the transportation of a shipment in two rail cars without requiring the shipper to pay the full carload weight minimum for the trailing car. The result is an increase for the trailing car ranging from 68% to 75% within Official Territory, which does not apply for many interterritorial shipments.[2] As a result, the Fourth Section departures in Docket 36817 created enormous long haul-short haul differentials forbidden by the statute and petitioner documented its objections to these as such at pp. 118 through 122 of its brief to the Commission in Docket 36817. In the proceeding below the railroads proposed no cancellation of Rule 24. In short, Docket 36817 raises Fourth Section issues quite different both in magnitude and quality from those which the Commission ignored in its decision below in the instant case. It is therefore not true, as the Government reply brief implies, that "if the Commission should determine in the pending proceeding that the Fourth Section departures were not previously authorized," then "petitioner would be free to seek damages for any injury it has suffered by filing either an administrative complaint or a civil action." (Government reply brief, p. 3).

Furthermore the two-year statute of limitations on the "administrative complaint or civil action" provided by 49 U.S.C. §§8, 9 will begin to expire November 30, 1978, two years after

[1] On some paper articles.

[2] Docket 36817, GWTA brief, p. 8.

the date the increase in the instant proceeding became effective. (§16(3)(b) of the Interstate Commerce Act, 49 U.S.C. §16(3)(b)).

2. The Government suggests as a second reason why decision of the Fourth Section argument ought to be left for Docket 36817 the filing by the railroads in that docket of "precautionary applications for exceptions concerning the new rates on these paper goods" (Government reply brief, p. 2)—by which the Government appears to suggest that the railroads for the first time have filed an application for Fourth Section relief in Docket 36817, a procedural aspect missing from the instant proceeding. Again the Government has gone outside the record, and again it has misled. Exactly such an application was filed before the Commission in the record below, as the railroad respondents admitted in their reply to the shipper opening statement

> "Attached to respondents' opening statement of facts and argument filed herein was Fourth Section Application E.R. No. 3052 which sought relief from Fourth Section departures at Official Territory points which are intermediate to points in Southern Territory."[3]

In the record herein the Commission paid no addition to this application, neither granting nor denying it, and in essence paid no attention to the Fourth Section point raised. On the same procedural facts in Docket 36817, the Commission will certainly feel free to reach the same result if the Court of Appeals for the D.C. Circuit and this Court decline to rule that the Fourth Section must be enforced at the agency level.

3. The Government says that the Fourth Section "issue was not well developed on the present record" and that "by comparison" it has been elaborately developed in Docket 36817;

[3] Respondent reply to shipper opening statement, p. 9 (R.A., p. 155).

therefore it ought to be left for decision in the later proceeding.[4]

In a reply statement submitted by the shippers in the proceeding below, a total of 14 pages of material (R.A., pp. 80-89, 110-114) were devoted to a detailed analysis of Fourth Section law, and a detailed explanation of long and short haul mileage differentials to eight transportation markets, illustrative of the pattern of Fourth Section departures created by the rail rate increase under review. The question was carefully and elaborately briefed to the Commission below and there is no reason why the Commission order in Docket 36817, the later case cited by the government *dehors* the record, will differ in the slightest from the Commission's order herein under review, absent appropriate instructions from this Court.

The Government suggests that the shipper argument below concerning the Fourth Section was so casual, brief and insubstantial that the Commission was justified when it "made no explicit finding on the issue, but * * * stated that arguments not discussed were found to be without merit (Pet. App. A-13)." (Government reply brief, p. 2). The best way to answer the Government suggestion that the shipper Fourth Section argument herein is too trivial to warrant remark either from the administrative agency or the reviewing courts is to attach that argument to this reply brief physically, and accordingly pp. 110-114 and 080-089 from the record on appeal to the Court of Appeals below are attached hereto as an appendix.

It is quite true that the railroads failed to "elaborate" a Fourth Section defense in the proceeding below. However, that failure in no way distinguishes the proceeding below from Docket 36817, because in the later case the railroads continued to ignore the Fourth Section—to such an extent that the Commission's hearing officer had to order them to file a

[4] This argument conflicts squarely with the Government's accusation of triviality. If the case is trivial, why should the Fourth Section question raised need "development"?

posthearing statement of their defense in re the Fourth Section. (Docket 36817 transcript, pp. 850-854). In other words, so far as the railroads are concerned, the case below and Docket 36817 are in *pari materia*; in neither do the railroads propose seriously to seek or justify Fourth Section relief. In Docket 36817 counsel for the railroads suggested to the Hearing Officer that no attention need be paid the Fourth Section because the Commission "disregarded" it in the proceeding below, and the Court of Appeals affirmed this without opinion. (Docket 36817 transcript, p. 666).

CONCLUSION

For the foregoing reasons, the Government's suggestions should be rejected herein that (1) petitioner's Fourth Section argument is too trivial to warrant attention, (2) that this argument was never properly presented to the agency below, and (3) that the Fourth Section issues in a subsequent I.C.C. case, Docket 36817, not part of the record on appeal, are the same as those which the Commission refused to decide herein, and should therefore be allowed to govern the outcome herein. A writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

[080*] [Excerpts from the Record on Appeal]

ARGUMENT

I. Fourth Section Violations

To the accusation that the assailed rates violate the Fourth Section and that Fourth Section relief should not be granted, the railroads at p. 4 of **[081]** their opening statement make the following replies:

1. "The proposed rates will only increase somewhat the Fourth Section departures which already exist." A tripling of linear market proportion market over the routes affected where short haul shippers and receivers will be disadvantaged is more than "somewhat." The railroads are hardly in a position to invoke the maxim *de minimis non curat lex*.

2. "The existing departures * * * result from the different rate levels in Official and Southern Territory." Agreed. This is merely to say that Fourth Section departures exist; it does not justify them.

3. "The existing departures * * * recognized the varying conditions, including the revenue needs of the carriers, in the different territories." Undefined "varying conditions" and unquantified "revenue needs" cannot constitute a special case justifying violation of Section 4. Furthermore, whatever conditions there are that now "vary" and whatever "need" the respondents may have for "revenue" that is satisfied by Fourth Section departures penalizing only 8.2% of the transportation market, the application they have filed and the evidence accompanying it certainly do not demonstrate that these "conditions" and this "need" justify expansion of this penalty to 24.5% of their market.

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* Numbers appearing in brackets in text indicate page numbers of original record.

4. "These varying conditions have been recognized as constituting a special case justifying Fourth Section relief. *Class Rates At Points East of Rocky Mountains,* 308 I.C.C. 293 (1959); *Iron and Steel Within and To The Southwest,* 302 I.C.C. 329 (1957)." These precedents which respondents cite do not document their proposition and do not justify the relief sought.

[082] The railroad Fourth Section application in this proceeding seeks to increase intermediate rates to exacerbate old and create new short haul discriminations. In this situation the critical question becomes a justification for the escalated short haul rate level in terms not only of profitability but also of adequate excuse or reason for discriminating against the short haul shipper. Both of the cases which the railroads cite, *Iron and Steel Within and To The Southwest,* 302 I.C.C. 329 (No. 31865, Div. 2, 1957), and *Class Rates At Points East of Rocky Mountains,* 308 I.C.C. 293 (FSA 30891, Div. 2, 1959) decided Fourth Section applications which sought relief not in order to increase intermediate rates, but instead to decrease long haul rates for competitive reasons. Therefore in each of these proceedings the petitioning railroads had the benefit of a presumption that the existing intermediate rates were at a proper level, and the case turned on their success in establishing need for the long haul reductions which they sought to publish. In *Iron and Steel* the railroads had used a rate scale prior to 1953 applicable to movements of steel to the Southwest at the Class 32.5 level with a Docket 13535 mileage curve which was relatively high for the short haul and relatively low for the long haul. In 1953 the Commission prescribed an adjustment of this scale reducing it to Class 30, but using Docket 28300 mileages, the effect of which was to reduce short haul rates and somewhat to increase long haul rates, to the disadvantage of Eastern steel mills attempting to reach the Southwestern market (302 I.C.C. at 333, 338). The railroads began to encounter very heavy competition from contract truckers and from private highway carriage for short haul steel traffic to Southwestern destinations, among other

reasons, because of the development of producing points in or near the Southwest. Therefore on September 14, 1955 they modified the steel scale further to the Southwest **[083]** with reductions which ranged from 52.6% at 20 miles and 28.6% at 100 miles to 13.8% at 1200 miles. (302 I.C.C. at 335). They excluded from this adjustment, however, some short haul traffic lanes where, apparently, they did not encounter competition from contract truckers or private carriage warranting the reduction (302 I.C.C. at 339, 341), and the result was a series of Fourth Section departures in 9 transportation markets (6 destination departures and 3 origin departures) which the Commission carefully detailed in 302 I.C.C. at 340-341. The railroads justified the reduction of the long haul rates creating these departures by overwhelming proof of private carrier, truck and barge competition (302 I.C.C. at 334-335) and by cost evidence, of which the Commission said, "evidence is convincing that the [assailed] rates are compensatory." In point of fact the railroads showed, for the long haul, car mile earnings averaging 38.95¢ and car mile expense averaging 26.65¢, i.e. a contribution ratio of 46%. (302 I.C.C. at 337). Finally the Commission found that the existing short haul rates in traffic lanes unaffected by the reduction (and which therefore constitute rates higher for the short than for the long haul) were already either depressed to meet truck or water competition, had been previously prescribed by the Commission, or were the result of Docket 28300 class groupings (302 I.C.C. at 334-335, 341). The Commission adopted the policy reflected by its statement concerning these existing short haul rates, "relief is required to avoid * * * a needless sacrifice of revenue." (302 I.C.C. at 342). In other words, in order to enable the railroads to obtain additional net earnings by attracting additional long haul traffic, the Commission permitted them to reduce their long haul rates and, in order to avoid cancellation of this economic gain, the Commission refrained from requiring them to install **[084]** similar reductions for the short haul between points where such reductions were not necessary in order to retain traffic. It is important to note that,

although long haul Eastern producers appeared in the case in opposition to the railroads, seeking still more drastic long haul reductions, no shipper interest in the proceeding objected to maintenance of the higher short haul rates or sought the reduction of the short haul rates.

Class Rates at Points East of Rocky Mountains, 308 I.C.C. 293, supra, likewise involved no shipper objectors asking for reduction of short haul rates—in fact in that case there were no protestants at all. Again the railroads were seeking permission not to increase rates but instead to reduce them. Prior Fourth Section relief had authorized higher intermediate exceptions rates up to the level of the applicable class rates for the long haul. In 1957 Section 4 was amended to permit reduction of long haul rates on a circuitous route (for example between origin point A and destination point B) in order to meet a competitive rate via a direct route between A and B, without reducing short haul rates on the circuitous route. In other words route circuitry became an exception to the Fourth Section's long and short haul clause. However, sometimes it is the circuitous and not the direct route which publishes a competitive reduction, and when the direct route seeks to meet this reduction, this statutory exception does not apply. Therefore the direct route, when seeking to meet competition via a circuitous route, must either reduce short haul rates to avoid Fourth Section departures, or seek Fourth Section relief. *Class Rates* was an application by all of the roads for blanket such relief so long as the higher intermediate did not exceed the applicable class rate. (308 I.C.C. at 295-296). The Commission noted that Fourth Section relief is granted only in a "special case," and **[085]** it itemized four such cases which had been recognized in the past:

1. Competition making the long haul reduction necessary,

2. Route circuitry, which in 1957 ceased to be a "special case" and became a statutory exception,

3. Protection of "recognized [rate] groups," and

4. Protection of weak lines, i.e. permission to weak lines to maintain higher intermediate rates on the ground that they could not afford to take the revenue loss resulting from reducing intermediate rates. (308 I.C.C. at 297).

Class Rates then held that the pending application presented a fifth category of "special case" warranting a grant of relief from the long and short haul clause, namely relief sought by a direct route where the circuitous route controls the price and is the "rate making route."

Thus these two precedents on which the railroads lean: (1) involved applications to reduce and not to increase rates, and (2) posed the roads with the problem of proving that competitive necessity compelled the reduction and that the resulting reduced level was compensatory. In the pending investigation the railroads seek to increase, not reduce rates, need to show immunity, not vulnerability to competition (lest the increases unnecessarily violate the Fourth Section), and must show not adequacy but instead moderation as characterizing their profits from the proposed rates.

It is not sufficient, when increasing intermediate rates, merely to show them as below a maximum reasonable level in order to justify a Fourth Section violation. As the Commission remarked in *Railway Material* **[086]** *To, From and Within the Southwest* 220 I.C.C. 740, 742, 744 (I. & S. 4241, Div. 4, 1937), even though an increased rate scale was "not in excess of a maximum reasonable basis," that fact "does not warrant our approval of the fourth-section departures which would be created," in other words increases of intermediate rates above the level of long haul rates. Although this ruling was reversed on further hearing (225 I.C.C. 315), the reversal was only because of a showing of tariff terms which eliminated the Fourth Section departure. To the same effect are *Clay, Concrete, or Shale Products,* 179 I.C.C. 39, 47, 55 (I. & S. 3521, Div. 4, 1931); *Brick from Jackson,* 178 I.C.C. 713 (I. & S. 3610, Div.

3, 1931); *Sash Doors and Blinds*, 161 I.C.C. 718 (I. & S. 3391, Div. 3, 1930); *Grain and Grain Products*, 147 I.C.C. 3, 4 (I. & S. 3083, Div. 3, 1928); *Coal From Southern Illinois*, 123 I.C.C. 125 (I. & S. 2807, Div. 3, 1927); and *Tanning Extract From Lynchburg*, 122 I.C.C. 647 (I. & S. 2728, Div. 3, 1927).

Thus the railroads have supplied in this record no evidence of adequate reason to discriminate against short haul producers and receivers as they propose in this proceeding by increasing the short haul rates—beyond attempting to prove that such increases meet the customary standard of reasonableness under the Rule of Ratemaking—a standard which by itself is inadequate to justify Fourth Section relief. (Otherwise the Fourth Section would be a nullity, and would always been satisfied whenever a rate increase was shown to be within the zone of reasonableness).

In lieu of adequate proof of a basis for creating the Fourth Section departures confessed by their Appendix B, the railroads contend that "these variances * * * were created by different Ex Parte general increases **[087]** for interterritorial and intraterritorial rates * * * [which] were authorized by the Commission at the time the general increase tariffs were filed." (Railroad Opening Statement, p. 5). In other words the railroads appear to say that the Commission has already issued an order granting Fourth Section relief authorizing the differentials of short haul rates over long haul rates created by the tariff under suspension. The railroads do not cite the text of any such order or supply its docket number for the very good reason, as protestants contend, that there is no such order.

There is no question that in the legislative scheme long and short haul rate disparities are prohibited except to the extent explicitly permitted by Commission order. Congress has recently reaffirmed this explicit and fundamental element of transportation law by providing in the Rail Revitalization Act, Public

Law 94-210, in § 15(8)(f)(1) that nothing in the new regulatory reform of Part I of the Interstate Commerce Act shall "modify the application of Section * * * 4 * * * in determining the lawfulness of any rate or practice." Two fundamental policies underlie the long and short haul clause of Section 4: (1) Prohibition of reduction of long haul rates for competitive reasons below a level where they make an adequate contribution to the transportation burden, and (2) Prohibition of disparities between long and short haul rates such as to prejudice patrons producing or receiving at the short haul points. While both elements of policy always apply in the grant of Fourth Section relief, the former tends to be more important when the carrier seeks to reduce the long haul rate for competitive reasons, holding the short haul rate at existing levels, and the latter consideration tends to become more important when the carriers seek to increase the short haul rates for revenue purposes, holding the long haul rates at existing levels.

[088] The railroads have no Fourth Section relief authorizing the Fourth Section departures herein involved such as are cited above in Tables 1 and 2. They cannot rely on Fourth Section orders in ex parte general increase proceedings as authority, because the standard language in such orders (as, for example, in the Commission's order of March 21, 1975 in Ex Parte 310, *Increased Freight Rates & Charges, 1975, Nationwide*) stipulates the limitation

> "that carriers * * * are hereby authorized to depart from the provisions of section 4 of the act *to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 310 of this date.*" (Emphasis supplied.)

It goes without saying that the "increases in rates and charges" involved in the assailed tariff schedule were not "authorized in the order in Ex Parte No. 310" or in any other ex parte order which the carriers can cite. It is fundamental that

> "Fourth-section orders granting relief are permissive, but if availed of the conditions under which they are granted may not be disregarded and should be fully complied with in the tariffs containing the rates to be protected." *Livestock-Western District Rates* 176 I.C.C. 1, 150 (No. 17000, 1931).

Furthermore,

> "In authorizing carriers to establish lower rates to more distant points than to intermediate points it is our duty to establish reasonable limitations upon the rates which may be applied at the intermediate points." *Aluminum Sulfate from Bastrop, La., to the South* 286 I.C.C. 277, 281 (FSA No. 24262, Div. 2, 1952).

The Commission has, in its ex parte general increase orders, "established reasonable limitations upon the rates which may be applied at the intermediate points" by limiting Fourth Section relief solely "to the extent **[089]** necessary to establish and maintain the increases in rates and charges authorized" in the ex parte proceedings. There is no question that no ex parte Fourth Section order has authorized the Fourth Section departures contemplated in the 10% increase in rates applicable to paper and paper articles herein under discussion.

Finally the railroads contend (Railroad Opening Statement, pp. 5-6) that the Commission found in a factually similar proceeding that no Fourth Section departures requiring Fourth Section relief were created by an increase of the 36,000 pound rate scale applicable to some paper articles. The railroads referred to *Sanitary Paper, Western Truckline Territory* 9 I.C.C. Supp. 367 (Commerce Law Services) (Rev. Bd. No. 4, 1975, I. & S. No. 8978). While, concededly, this decision found an increase in a 36,000 pound rate scale applicable to sanitary papers to be just and reasonable, it will be searched in vain for any grant of Fourth Section relief or any finding of a Fourth

Section violation. It is quite apparent that, to the extent Fourth Section violations existed in that proceeding, the Commission's attention was never invited to them. Consequently the case can hardly be considered authority for the proposition that the clear Fourth Section violations conceded by railroad Appendix B should be condoned. The suspension order in this case recited explicitly Fourth Section departures as the reason for suspension. The respondent railroads cannot possibly satisfy their burden of proof in this regard by citation of a precedent which does not even mention the existence of Section 4 in the Interstate Commerce Act.

* * * * * * * *

[110] The dimension of Fourth Section departures involved in the proposed increases is supplied by Appendix B attached to the Fourth Section application set out in Exhibit 4 to the carrier opening statement. Rail Appendix B lists the long haul (Official-Southern, interterritorial) rates applying to the subject paper articles in 8 illustrative markets over a range of rate base miles. In each of these 8 markets rail Appendix B also supplies the short haul rate levels in that market (the rates applicable within Official Territory) where Fourth Section violations exist presently and where they will exist under the proposed rates. Table 8 below rearranges the data from rail Appendix B and draws appropriate conclusions from it. For example, lines 3, 4 and 5 of Table 8 are derived from p. 2 of Rail Appendix B. Line 3, col. (c) lists the long haul market in which a present Fourth Section violation results from the fact of a higher short haul date for a shorter distance, i.e., presently the rate of 97¢ per cwt. for 320 miles is exceeded by the rate of 98¢ for 300 miles. Columns (f) and (e) indicate that the two rates are approximately the same (the short haul rate is only 1% greater than the long haul rate), but that the short haul distance is 93% of the long haul distance. Line 11 of Table 8 indicates the change in these relationships proposed under the new rate scale. The long haul market which becomes related to the same short haul market of 300 miles is a haul of 400 miles at a rate of $1.11

per cwt., and at the shorter distance of 300 **[111]** miles the higher rate of $1.12 applies. As indicated in Column (f) the short haul rate is approximately the same as the long haul rate (1% higher), but column (e) indicates that the short haul distance is only 75% of the long haul distance.

TABLE 8

Transportation markets listed in rail Fourth Section application

	Short Haul		Long Haul		Ratio Short ÷ Long Haul	
	Miles	Rate	Miles	Rate	Miles	Rate
	(a)	(b)	(c)	(d)	(e)	(f)
			NOW			
1.	100	56	100	52	1.00	1.08
2.	200	82	220	81	.91	1.01
3.	300	98	320	97	.93	1.01
4.	400	119	440	117	.91	1.02
5.	500	136	520	134	.96	1.01
6.	600	152	680	151	.88	1.01
7.	700	163	740	161	.94	1.01
8.	800	183	900	181	.88	1.01
			PROPOSED			
9.	100	70	180	68	.56	1.03
10.	200	94	300	91	.66	1.03
11.	300	112	400	111	.75	1.01
12.	400	131	500	125	.80	1.05
13.	500	152	680	151	.74	1.01
14.	600	166	760	164	.79	1.01
15.	700	179	850	171	.83	1.05
16.	800	204	1100	202	.78	1.01

Table 9 relists the long haul mileages in column (c) of Table 8 in ascending order of magnitude.[1] These long haul miles represent the size, in terms of linear length of a transportation market where, as a result of a Fourth Section departure, a producer or a receiver at a shorter distance is placed at a competitive disadvantage because the rate he must pay exceeds **[112]** the rate which his competitor pays for transportation over the long haul from one end of the market to the other. Once the short haul rate exceeds the long haul rate level, one knows that any increase of the short haul distance will result in either the same or a higher short haul rate. Therefore this short haul competitive disadvantage persists over the remainder of the distance which separates the short from the long haul. Again to use an example the existing Fourth Section departure documented at line 3 of Table 8, the mileage of this long haul market is listed at line 5 of Table 9, and the distance which separates the prejudiced short haul (300 miles) from the preferred long haul (320 miles) is a distance of 20 miles, over the full span of which the rate for the short haul will exceed the rate for the long haul. Therefore column (b) records that the number of linear miles in the long haul transportation market which are penalized by a higher short haul rate is 20 miles.

The change in relationship under the proposed rates reflected at line 11 of Table 8 is recorded on line 6 of Table 9 where column (a) lists the length of the transportation market as 400 miles and column (c) lists the span of this total market (100 miles) over which a producer or a receiver may be located whose short haul move in the market is penalized by a rate higher than that assessed for the long haul over the full span of the market. Column (b) of Table 9 collects the linear miles

[1] Although there are 16 lines in Table 8, Table 9 needs only 15 lines to duplicate this data, because, as noted at line 10 of Table 9, a long haul mileage of 680 miles is listed twice in column (c) of Table 8 at lines 6 and 13.

of market thus penalized under existing Fourth Section departures and column (c) collects the miles proposed to be penalized under the new rate structure.

[113] **TABLE 9**

Market analyzed by mileage blocks

	Dimension of Transportation market in linear rate base miles	Linear Miles of penalized short haul in the market	
		Now	Proposed
	(a)	(b)	(c)
1.	100		
2.	180		80
3.	220	20	
4.	300		100
5.	320	20	
6.	400		100
7.	440	40	
8.	500		100
9.	520	20	
10.	680	80	180
11.	740	40	
12.	760		160
13.	850		150
14.	900	100	
15.	1100		300

Table 10 sums up the conclusions which can be drawn from the foregoing figures. Line 2, column (b) of Table 10 is the total number of miles listed in column (c), lines 1 through 8 of Table 8, i.e., the total linear miles of market where rail Appendix B analyzes rail rate behavior in the 8 markets studied. Line 2, column (c) of Table 10 supplies the same information for the total miles under the proposed rate structure listed in column (c), lines 9 through 16 of Table 8. Line 3 of Table 10

is the total of penalized miles under the present rate structure from column (b) of Table 9 and under the proposed rate structure from column (c) of Table 9. Line 4 of Table 10 is the ratio of penalized miles in line 3 to total miles in line 2. Lines 5 and 6 supply averages for the 8 markets involved.

[114] **TABLE 10**

Measurement of transportation market in terms of linear, rate-base miles

	Under existing 4th Section relief	Under 4th Section relief applied for
(a)	(b)	(c)
1. Number of markets analyzed	8	8
2. Total linear miles	3920	4770
3. Penalized linear miles	320	1170
4. Portion of total market penalized	8.2%	24.5%
5. Average miles per market	490	596
6. Average penalty miles per market	61	75

At the present time the railroads claim to have Fourth Section relief justifying higher rates for the short haul applicable to or from points located over an average of 8.2% of the length of the routes involved. They are now asking for permission to increase these intermediate rates over short hauls sufficiently high as to extend the percentage of distance over their routes where the short haul producer or consumer is prejudiced from an average of 8.2% to an average of 24.5%. In other words they appear to want to triple the route proportions where their rates will be allowed to place the short haul shipper or receiver at a competitive disadvantage vis-a-vis his long haul rival.

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